QUESTION PRESENTED

Whether the exemption provided by 26 U.S.C. 1402(g) from the tax on self-employment income imposed by 26 U.S.C. 1401 violates the Free Exercise Clause or Establishment Clause of the First Amendment or denies equal protection of the law to an individual who is not a member of a religious organization.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-394

MARTIN H. DROZ, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-30) is reported at 48 F.3d 1120. The opinion of the Tax Court (Pet. App. 10-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1995. A petition for rehearing was denied and an amended opinion was entered on June 1, 1995 (Pet. App. 20). The petition for a writ of certiorari was filed on August 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Individuals with self-employment income are required to participate in the Social Security system and to pay a tax on that income at the combined rates of the Social Security taxes paid by employers and employees on wages. 26 U.S.C. 1401. A narrow exemption from this tax is provided by 26 U.S.C. 1402(g). The exemption is available to "a member of a recognized religious sect" that has "established tenets or teachings" "by reason of which [the member] is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care" (*ibid.*). The statute limits the availability of the exemption to persons who are members of religious sects that "make provision for their dependent members which * * * is reasonable in view of their general level of living" (26 U.S.C. 1402(g)(1)(D)).

Petitioner was self-employed during 1988. He states that he is not a member of any formal church or religious organization but that he has religious objections to the Social Security system (Pet. App. 11-12, 21). When petitioner filed his 1988 federal income tax return, he reported his self-employment income but did not compute or pay the required self-employment tax on that income (*id.* at 11, 20-21). The Commissioner of Internal Revenue therefore issued a notice of deficiency to petitioner, asserting a deficiency of $5,749 in petitioner's 1988 taxes under 26 U.S.C. 1401 (*id.* at 11, 21).

2. Petitioner sought review of the asserted deficiency in the Tax Court (Pet. App. 11). Petitioner

did not dispute that he failed to satisfy the requirements for an exemption from the tax under 26 U.S.C. 1402(g) (Pet. App. 12-13). He contended instead that the requirements that Congress imposed on the availability of that exemption violated the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment.

The Tax Court rejected petitioner's contentions. The court held that the requirement that individuals participate in the Social Security system serves an obvious and compelling secular purpose and does not impede the free exercise of religion (Pet. App. 14, citing *United States* v. *Lee*, 455 U.S. 252 (1982)). The court further held that, in creating a system of social security, Congress properly could distinguish between participation by (i) individuals whose needs independently will be satisfied by an established religious organization and (ii) individuals whose "personal beliefs alone are the basis for the conscientious objection" and who therefore cannot look to others to provide an alternative to the security that the Social Security system provides (Pet. App. 13). The court therefore concluded that the narrowly drawn exemption contained in 26 U.S.C. 1402(g) does not violate the Establishment Clause or deny equal protection of the laws to petitioner (*ibid.*).

3. The court of appeals affirmed (Pet. App. 17-30). The court noted that in *United States* v. *Lee*, 455 U.S. 252, 257 (1982), this Court held that "the government had a compelling interest in enforcing participation in the Social Security system in order to insure the 'fiscal vitality' of a system designed to serve the social welfare" and that this "compelling interest * * * outweighed the burden that participation" may

place on religious beliefs (Pet. App. 23, citing *United States* v. *Lee*, 455 U.S. at 259-261). The court further noted that the carefully drawn exemption contained in 26 U.S.C. 1402(g) is narrowly tailored to protect the government's compelling interest in ensuring broad participation in the Social Security system (Pet. App. 22-25). The court concluded that the exemption does not represent an establishment of religion because it does not promote some religions over others but is instead designed to ensure that all citizens are protected by an organized public or private welfare system (*id.* at 25-27). The court held that the exemption scheme is narrowly drawn to protect this compelling secular purpose and does not violate equal protection or due process of law (*id.* at 28).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. There is no conflict among the courts of appeals on the question addressed and decided in this case. Petitioner simply contends that the decision upholding the statute is wrong, not that it conflicts with any decision of a court holding the statute unconstitutional. Indeed, no case has held this statute to be unconstitutional. Because no conflict exists on the question presented in this case, further review is not warranted.

2. The court of appeals correctly held that application to petitioner of the federal self-employment tax imposed under 26 U.S.C. 1401 is not unconstitutional.

a. The requirement that petitioner pay self-employment taxes does not violate the Free Exercise

Clause of the First Amendment. In *United States* v. *Lee*, 455 U.S. 252 (1982), the Court rejected the claim of an Amish employer that, under the Free Exercise Clause, he should not be required to pay the employer's share of the Social Security tax on the wages of his Amish employees. The Court did not doubt that compulsory participation in the Social Security system may interfere with the free exercise of Amish religious principles; but the Court upheld the statute because the government has a compelling interest in maintaining the fiscal vitality of a comprehensive insurance system for which mandatory participation is indispensable. *Id.* at 258-259. The court of appeals correctly relied on *Lee* in rejecting petitioner's Free Exercise claim in this case (Pet. App. 22-25).

Here, as in *Lee*, application of the tax is in furtherance of the compelling governmental interest in providing funding for a universal security system for the Nation's citizens (Pet. App. 22-25). See *Ballinger* v. *Commissioner*, 728 F.2d 1287, 1290-1292 (10th Cir. 1984); *Olsen* v. *Commissioner*, 709 F.2d 278, 280-282 (4th Cir. 1983). The narrowly drawn exemption from this tax that is provided by Section 1402(g) is consistent with that compelling interest, for it permits individuals to withdraw from the Social Security system only if they are members of a religious organization whose tenets of faith include making provision for the security of its members. 26 U.S.C. 1402(g)(1)(D). A person, such as petitioner, who is not a member of such a protective religious organization thus falls outside both the text and the purpose of the statutory exemption from tax (Pet. App. 25).

The narrowly tailored exemption from tax provided by Section 1402(g) is the least restrictive means for

advancing the government's compelling interest (Pet. App. 20, 23 & n.2).[1] As the court of appeals noted in this case, "[o]ther courts that have addressed this issue have reached this [same] result" (*id.* at 25 citing, *e.g.*, *Olsen* v. *Commissioner*, 709 F.2d at 280-282; *Kelley* v. *Terry*, 629 F.2d 572, 573 (9th Cir. 1980)).[2] No case has concluded to the contrary.

b. The court of appeals also correctly held that the exemption from the self-employment tax provided by Section 1402(g) of the Internal Revenue Code does not violate the Establishment Clause of the First Amend-

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[1] *Amicus* Rutherford Institute contends that the question to be addressed under the Religious Freedom Restoration Act of 1993 is whether the interference with religious freedom "is the least restrictive means" of furthering the government's compelling interest (Am. Br. 7, quoting 42 U.S.C. 2000bb-1(b) (Supp. V 1993)). The court of appeals correctly concluded in this case that the exemption "is narrowly tailored to achieve" the government's compelling interest (Pet. App. 23) and represents the "least restrictive means" of doing so (*id.* at 23 n.2). The suggestion of *amicus* that the court of appeals "erred in failing to apply the statutory mandate" (Am. Br. 8) is simply not correct. See Pet. App. 20 (describing the applicable test to be whether the statute is "justified by a compelling interest that could not be achieved through less restrictive means").

[2] Petitioner's reliance (Pet. 7) on *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989), is misplaced. That case involved a denial of state unemployment benefits to an individual whose religious principles required that he not work on Sundays. The Court concluded that the State's interest would not have been jeopardized by an accommodation of the religious principles of the plaintiff. *Id.* at 835. In *Lee*, by contrast, the Court concluded that the government's compelling interest in maintaining a fiscally sound Social Security program would be threatened by granting "myriad exceptions." 455 U.S. at 258-261.

ment. As the Tax Court explained, in creating a system of social security, Congress properly may distinguish between participation by individuals whose needs independently will be satisfied by an established religious organization and individuals whose "personal beliefs alone are the basis for the conscientious objection" and who therefore cannot look to others to provide an organized alternative to the security that the Social Security system provides (Pet. App. 13). As the court of appeals concluded, the exemption does not represent an establishment of religion because it is designed to promote the secular purpose of ensuring that all citizens are protected by an organized public or private welfare system (*id.* at 28).[3]

Petitioner contends (Pet. 7-8) that the conclusion of the court of appeals cannot be reconciled with this Court's decisions in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), and *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989). Neither of those decisions, however, supports petitioner's claim that an individual must be allowed an election to withdraw from the Social Security system based upon personal religious preferences.

Texas Monthly involved a state sales tax exemption for periodicals and books published or distributed by a religious faith and wholly devoted to the tenets and teachings of the faith; other books and periodicals were subject to the tax. 489 U.S. at 5-6. A divided

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[3] For these same reasons, the exemption does not deny petitioner equal protection of the laws (Pet. App. 13, 26). Although petitioner refers to the Equal Protection Clause in describing the question presented in this case (Pet. i), no separate argument under that Clause is advanced in the petition.

majority of the Court held that this differentiation of literature based upon religious content violated either the Establishment Clause or the Press Clause of the First Amendment. *Id.* at 17; *id.* at 25-26 (White, J., concurring); *id.* at 28 (Blackmun, J., concurring). In *Frazee* the Court held that the State could not deny unemployment compensation to petitioner merely because he refused, based upon sincere religious beliefs, to work on Sunday. 489 U.S. at 832-835. As the court of appeals explained in this case, however, the exemption involved here differs from *Texas Monthly* and *Frazee* because it does not "discriminate among religions" or in favor of religions (Pet. App. 26):

> Section 1402(g) does not discriminate among religions: it accommodates, consistent with the goals of the Social Security system, those who oppose Social Security on religious grounds. * * * Put differently, § 1402(g) grants a religious exemption, provided that the individual belongs to an organization with its own welfare system. This is not a promotion of some religions over others. It is a religious exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church. In addition, the fact that § 1402(g)'s effect is to neither advance nor inhibit religion is shown by the requirement that a person must waive all Social Security benefits to receive an exemption. 26 U.S.C. § 1402(g)(1).

No case has reached a different conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ANN B. DURNEY
ANTHONY T. SHEEHAN
Attorneys

NOVEMBER 1995